The New ‘Irretrievable Breakdown’ Ground for Divorce

April 2011
By Bari Brandes Corbin and Evan B. Brandes

Domestic Relations Law (DRL) § 170 was amended in 2010 to add "irretrievable breakdown" in subdivision 7, a "no-fault ground" for divorce. After it became effective on Oct. 12, 2010, many thought that the new ground would make it possible for one party to the marriage to unilaterally end it. Not so fast.

In order to establish a cause of action and obtain a divorce under DRL § 170 (7), the party seeking the divorce on irretrievable breakdown grounds must, in addition to satisfying the residence requirements of DRL § 230, establish that: 1) the relationship between husband and wife has been irretrievably broken; 2) for a period of at least six months. In addition, the plaintiff or defendant must state under oath that the relationship is irretrievably broken.

What Constitutes an ‘Irretrievably Broken’ Relationship?

The legislature failed to define the term "irretrievably broken" in the statute, which leaves the question open to interpretation. Black's Law Dictionary (8th ed. 2004) states that an "irretrievable breakdown of the marriage" is a ground for divorce based on incompatibility that is used in many states as the sole ground of no-fault divorce. It defines "irreconcilable differences" as "persistent and unresolvable disagreements between spouses, leading to the breakdown of the marriage. These differences may be cited — without specifics — as grounds for no-fault divorce. At least 33 states have provided that irreconcilable differences are a basis for divorce.

An examination of the case law in other states that have adopted the "irretrievable breakdown," as opposed to "irreconcilable differences" as a ground for divorce appear to indicate that a marriage has irretrievably broken down when the relationship is for all intents and purposes ended. 27A C.J.S. Divorce § 30. Where no guidelines are established as to what constitutes an irretrievable breakdown, courts consider each case individually, (see, e.g., Flora v. Flora, 166 Ind. App. 620 (1st Dist. 1975); Joy v. Joy, 178 Conn. 254 (1979)) and the determination whether the marriage is broken must be based on an inquiry into all the surrounding facts and circumstances. In general, a marriage is irretrievably broken when, for whatever reason or cause and no matter whose fault, the marriage relationship is for all intents and purposes ended; when the parties are unable, or refuse, to cohabit; or when it is beyond hope of reconciliation or repair. The principal question to be determined is whether the marriage is at an end and beyond reconciliation.

In some states irretrievable breakdown of a marriage may be sufficiently shown by both parties alleging the breakdown. In others, one party seeking a divorce or dissolution on the ground of irretrievable breakdown, and the other seeking divorce or dissolution on a ground involving misconduct, will suffice (see, e.g., Herring v. Herring, 237 Ga. 771 (1976)). In some states, the decision that a marriage is irretrievably broken need not be based on any identifiable objective fact. It is sufficient that one or both parties subjectively decide that their marriage is over and there is no hope of reconciliation. See, e.g., Caffyn v. Caffyn, 441 Mass. 487 (2004).

Irretrievable breakdown has been adopted as a ground for divorce in the following 17 states: Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Missouri, Nebraska, Pennsylvania, and Wisconsin. However, none of the state laws define the term irretrievable breakdown. The consensus among the states appears to be that the term "irretrievable breakdown" means a

breakdown of the marriage to the point that reconciliation is not possible or probable. In adition, the Uniform Marriage and Divorce Act § 305 (c) defines a finding of irretrievable breakdown as "a determination that there is no reasonable prospect of reconciliation." See Ula Marr & Divorce § 305.

A Matter of Proof

It is clear from the statute that in New York the court must find that the marriage is irretrievably broken as a predicate to the granting of a divorce. On its face, D.R.L. § 170(7) appears to allow the court to grant a judgment of divorce where one spouse states under oath that the relationship between husband and wife is irretrievably broken. This construction would eliminate any defenses to this ground. However, the authority in other jurisdictions that have adopted this ground for a divorce supports the conclusion that the defendant can raise the defense that the marriage is not irretrievably broken. States where irretrievable breakdown is a ground for divorce have held that the court presiding over an action for divorce on the ground of irretrievable breakdown has a duty to determine whether the marriage is, in fact, irretrievably broken. See, e.g., Mize v. Mize, 891 S.W.2d 895 (Mo. Ct. App. W.D. 1995).

Moreover, this construction does not eliminate the five-year statute of limitations applicable to actions for a divorce. The Domestic Relations Law provides that no action for divorce may be maintained on a ground that arose more than five years before the date of the commencement of the action except where abandonment or separation pursuant to agreement or decree is the ground. D.R.L. § 210.

Problems of proof arose recently in Strack v. Strack, N.Y.S.2d, 2011 WL 356058 (N.Y.Sup.), the first reported case to construe the statute. There, the Supreme Court found that the grounds set forth in D.R.L. § 170(7) were subject to the five-year statute of limitations and that the legislative history pertaining to D.R.L. § 170(7) supported its conclusion that D.R.L. § 170(7) was simply a new cause of action subject to the same rules of practice governing the subdivisions that have preceded it. It noted that D.R.L. § 173 provides that "[i]n an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce" and, that the legislature failed to include anything in D.R.L. § 170(7) to suggest that the grounds contained therein were exempt from this right to trial. It noted that the phrase "broken down such that it is irretrievable" is not defined in the statute, and the determination of whether a breakdown of a marriage is irretrievable is a question to be determined by the finder of fact. The court held, however, that whether a marriage is so broken that it is irretrievable need not necessarily be so viewed by both parties, and that the fact-finder may conclude that a marriage is broken down irretrievably even though one of the parties continues to believe that the breakdown is not irretrievable and/or that there is still some possibility of reconciliation.

One More Consideration

It should be noted also that no judgment of divorce may be granted upon a finding of irretrievable breakdown unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce. D.R.L. § 170 (7) as added by Laws of 2010, Ch 384.

Where the parties to a contested action for a divorce have agreed that the divorce will be uncontested, it has been the practice of New York courts to permit them to submit the matter to the court for determination upon affidavits and the required papers, or to hold an inquest on a fault ground. Where the papers were submitted, the court would reserve decision until the resolution of the ancillary issues. Where the court held an inquest, the court would grant a judgment of divorce, but hold the entry of the judgment in abeyance pending the resolution of the ancillary issues. The practice of granting the judgment and holding its entry into abeyance pending the resolution of the ancillary issues is not permitted under subdivision 7, which prohibits the granting of a judgment of divorce until all of the ancillary issues are resolved by the parties, or determined by the court and incorporated into the judgment of divorce. However, the court can still hear the testimony and reserve decision.

Bari Brandes Corbin maintains her offices for the practice of law in Laurel Hollow, NY. She is co-author of Law and the Family New York, Second Edition, Revised, Volumes 5 & 6 (Thomson-West). Evan B. Brandes is an associate with Baker & McKenzie in Sydney, Australia. They co-author, with Joel R. Brandes, President of Joel R. Brandes Consulting Services Inc. (www.brandeslaw.com), the annual supplements to Law and the Family New York, Second Edition, Revised (Thomson-West).

Go To Top of Page